
United States
Circuit Court of Appeals
For the Ninth Circuit.

OLMSTED-STEVENSON COMPANY, a Corporation,
Petitioner,
vs.
R. S. MILLER, Bankrupt,
Respondent.

In the Matter of R. S. MILLER, Bankrupt.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress, Approved
July 1, 1898, to Revise, in Matter of Law, of a Certain
Order of the United States District Court
for the District of Montana.

Filed

OCT 15 1915

F. D. Monckton,
Clerk

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*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

In the Matter of R. S. MILLER,

A Bankrupt.

**Petition for Review and Revision of Order of
District Court.**

PETITION FOR REVIEW AND REVISION OF
ORDER OF DISTRICT COURT REFUS-
ING TO OPEN THE ABOVE PROCEED-
ING AND TO COMPEL THE BANKRUPT
TO AMEND HIS SCHEDULE OF ASSETS.

To the Honorable Judges of the United States Cir-
cuit Court of Appeals for the Ninth Circuit:

The petition of Olmsted-Stevenson Company, a
corporation, organized and existing under the laws
of the State of Montana, respectfully shows:

I.

That on or about the 5th day of February, 1914,
the above bankrupt, R. S. Miller, voluntarily filed
his petition in bankruptcy in the District Court of
the United States in and for the District of Mon-
tana, together with schedules of his debts, assets and
property.

II.

That thereafter, by order of the said Court, duly
made and given, the said R. S. Miller, was adjudged
a bankrupt, and subsequently surrendered to said
Court certain property, which he claimed to be all
the property not exempt under the laws of the State
of Montana, of which he was the owner at the time
said petition was filed.

III.

That thereafter, and in the month of April, 1914, the said R. S. Miller was discharged from bankruptcy by the order of said District Court of the United States in and for the District of Montana.

That your petitioner was recognized as a creditor of said R. S. Miller, bankrupt, and its name inserted in the schedule of creditors and said schedule further shows that there was due to your petitioner from said bankrupt, R. S. Miller, at the time of the filing of said schedule, the sum of Nine Hundred and Sixty-five and 30/100 (\$965.30) dollars.

That the trustee in bankruptcy of the said bankrupt, R. S. Miller, has accepted proof of your petitioner's claim against the estate of R. S. Miller, bankrupt, in the sum of Nine Hundred and Sixty-five and 30/100 (\$965.30) dollars.

IV.

That thereafter and early in the month of October, 1914, your petitioner filed in the above-entitled cause in said District Court of the United States, in and for the District of Montana, its duly verified petition asking that the bankruptcy proceedings herein be opened, and that the bankrupt, R. S. Miller, be ordered and compelled to file an amended schedule of his assets and property, which petition, (omitting the heading and formal parts thereof), was as follows:

**Petition to Open Bankruptcy Proceedings and Com-
pel Bankrupt to Amend His Schedule of Assets
and Property.**

PETITION TO OPEN BANKRUPTCY PRO-
CEEDINGS AND COMPEL THE BANK-
RUPT TO AMEND HIS SCHEDULE OF
ASSETS AND PROPERTY.

“To the Honorable Court Aforesaid:

Comes now the Olmsted-Stevenson Company, a
corporation, and respectfully shows to the Court:

I.

That said Olmsted-Stevenson Company, during all
the times hereinafter mentioned, has been and still
is a corporation, organized, created and existing un-
der and by virtue of the laws of the State of Mon-
tana and engaged in the mercantile business, with
its principal place of business at Dillon, Beaverhead
County, Montana.

II.

That on the 5th day of February, 1914, the above-
named bankrupt, R. S. Miller, voluntarily filed his
petition in bankruptcy in this Court, together with
the schedules of his debts, assets and property.

III.

That thereafter, by an order of said Court, duly
made and given, said R. S. Miller, was adjudged a
bankrupt and subsequently thereto surrendered to
said Court, certain property, which he claimed to
be all of the property not exempt under the laws of
the State of Montana, of which he was the owner
at the time said petition was filed.

IV.

That in the schedule of debts owing by said bankrupt, as filed in this court, on the said 5th day of February, 1914, was included as one of his creditors, your petitioner, the Olmsted-Stevenson Company, a corporation, and it was alleged in said schedule that the amount of indebtedness due from said bankrupt, to said Olmsted-Stevenson Company, was the sum of Nine Hundred Sixty-five and 30/100 Dollars (\$965.30).

V.

That thereafter and within the time allowed by law, said Olmsted-Stevenson Company, duly proved its claim and caused the same to be filed in said estate and that said claim as proved and filed was of the amount of Nine Hundred and Sixty-five and 30/100 Dollars (\$965.30).

VI.

That thereafter and on the 18th day of September, 1914, a dividend was paid out of the assets of said estate of said bankrupt and your petitioner, the Olmsted-Stevenson Company, received the sum of Nine and 65/100 dollars (\$9.65) which was by it duly credited upon its proved claim, and after such credit was allowed there remained and still remains due from said bankrupt to the said Olmsted-Stevenson Company, the sum of Nine Hundred Fifty-five and 65/100 Dollars (\$955.65).

VII.

That accompanying said bankrupt's petition in bankruptcy, was a schedule of said bankrupt's assets, but said schedule omitted therefrom, a crop of

wheat, which had theretofore been seeded upon and was then growing upon the lands of said R. S. Miller, and which had been planted and seeded between the month of August, 1913, and the date of the filing of said petition, and which said crop of wheat then growing upon said land of said R. S. Miller has, since the filing of said petition, matured, been harvested and threshed and said crop yielded approximately one thousand bushels of wheat, of the value of approximately Nine Hundred Dollars (\$900.00).

VIII.

That the said bankrupt failed and neglected to include said growing crop of wheat in said schedule of the property owned by him and that said crop of wheat should have been included therein and he should have shown the same to be of the value of Nine Hundred Dollars (\$900.00).

IX.

That no part of said crop of wheat and no part of the value thereof was ever administered in said estate for the benefit of the creditors and that said property should have been included in said schedule and thereafter administered in said estate and dividends paid to the respective creditors, whose claims were proved, out of the amount realized from the sale of said crop.

X.

That your petitioner is informed and believes and therefore alleges that on or about the——day of April, 1914, by an order duly made and given, in the above-entitled court, said R. S. Miller was discharged in bankruptcy and your petitioner further

avers that at the time of said discharge, said estate of said bankrupt had not been fully administered and there remained to be administered the said crop of said wheat of the value of aforesaid and that since said date and prior to the date of the filing of this petition, said property has not been surrendered by said R. S. Miller to the trustee in bankruptcy or the referee in bankruptcy, for the benefit of the creditors and said R. S. Miller has wrongfully retained said property for his own use and benefit and failed and neglected to surrender the same or any part thereof to the said estate, for the benefit of the creditors of said R. S. Miller, bankrupt.

XI.

That at the time of filing the schedule of property owned by him, as aforesaid, and at all times thereafter, the said R. S. Miller, knowingly, and fraudulently, concealed said property, and knowingly and fraudulently failed and neglected to include the same in the schedule of property filed by him, and failed to surrender the same for the benefit of his creditors, and that said property was not delivered up or surrendered by said Miller, for the use or benefit of said creditors.

XII.

That neither your petitioner, nor any of its officers or employees had knowledge of the failure of said R. S. Miller to include said crop in his schedule of property until on or about the 18th day of September, 1914, upon which date your petitioner received the aforesaid dividend and thereafter instituted investigation to ascertain whether said Miller had sur-

rendered all of his property to the trustee in bankruptcy and all of the property which said creditors were entitled to have administered in said estate, and thereupon learned that said crop of wheat, harvested and threshed as aforesaid, had not been included as assets of said Miller, in his schedule, or administered in said bankrupt's estate and shortly thereafter your petitioner prepared an application to have said schedule amended so as to include said crop of grain and subsequently ascertained by an order duly made and given, said Miller was discharged in bankruptcy on or about the——day of April, 1914, and that said application so to amend said schedule could not be filed until said matter was by an order of said Court opened and leave therefor obtained.

WHEREFORE, your petitioner prays that said matter be reopened and that said Miller be required to amend his schedule of property owned by him at the time of filing his petition in bankruptcy, so as to include said crop of wheat and that said Miller be required to deliver up said crop of wheat or any thereof, which is in his possession, to a trustee in bankruptcy to be appointed by said court for that purpose, and in the event that any of said wheat has been disposed of or appropriated to the use of said Miller, that he be required to account for and pay to the trustee in bankruptcy, the value thereof and that said property be administered in said estate as if it had been included in said schedule when the same was filed and for such other and further relief as to

the Court may seem proper and just.

OLMSTED-STEVENSON COMPANY,

A Corporation,

By B. N. STEVENSON,

Its Secretary-Treasurer.

(Duly verified).”

V.

That thereafter and on or about the 29th day of October, 1914, Frank W. Haskins, the duly appointed, qualified and acting Referee in bankruptcy, in said District Court of Montana, regularly made his order requiring the said bankrupt to appear before him, as such Referee, on the 7th day of November, 1914, at 2 o'clock in the afternoon of said day, to show cause, if any he had, why said bankruptcy proceedings should not be opened and the said bankrupt required to file an amended schedule of his said assets and property, which said order of said Referee, (omitting the heading and formal parts thereof), was as follows:

Order of Referee, etc., in Bankruptcy Directing Bankrupt to Show Cause Why He Should not be Required to File an Amended Schedule.

“Whereas, the Olmsted-Stevenson Company, a corporation, has filed herein a petition alleging that the above-named bankrupt has concealed certain assets and not included the same in his schedule filed herein, and asks that the said case be reopened and the bankrupt required to amend the schedule to include a crop of wheat which is alleged to be in his possession, and to be required

to deliver the same over to the Trustee in bankruptcy.

It is therefore ordered that the said bankrupt, R. S. Miller, be, and he is hereby required to be and appear before the undersigned Referee, 16 West Broadway, Butte, Montana, on the 7th day of November, A. D., 1914, at two o'clock in the afternoon, then and there to show cause, if any he has, why he should not be required to file an amended schedule to include said property so alleged to have been withheld, and further to deliver the same to the Trustee in bankruptcy herein.

It is further ordered, that service of this order be made by the mailing of a copy of this order to the Attorney for said bankrupt Henry G. Rodgers, Esq., and also a copy of said order to the attorneys for said company, the Olmsted-Stevenson Company, to wit, Norris, Hurd & Smith; that such copies be enclosed within return and penalty envelopes, addressed to said attorneys at Dillon, Montana.

Dated Oct. 29, 1914.

FRANK W. HASKINS,
Referee in Bankruptcy."

VI.

That on or about the 7th day of November, 1914, the said bankrupt, R. S. Miller, appeared before said Referee and filed in said bankruptcy proceedings, in said District Court of the United States, in and for the District of Montana, his answer to said petition of your petitioners, which answer, (omitting

the heading and formal parts thereof), was as follows:

[Answer.]

“Now comes the above-named bankrupt, R. S. Miller, and for answer to the petition of Olmsted-Stevenson Company, a corporation, admits, denies and alleges:

First.

Admits the allegations set out and contained in the first paragraph of said petition.

Second.

Admits the allegations set out and contained in paragraph second of said petition.

Third.

Replying to paragraph three of said petition, admits that thereafter, by order of said Court, duly made and given, he was adjudged a bankrupt and subsequently thereto surrendered to said Court, certain property which he claimed to be all of the property not exempt under the laws of the State of Montana, and the United States, of which he was the owner at the time said petition was filed, and at the time he was adjudicated a bankrupt as aforesaid.

Fourth.

Admits the allegations set out and contained in paragraph four of said petition.

Fifth.

Admits the allegations set out and contained in paragraph five of said petition.

Sixth.

Admits the allegations set out and contained in paragraph six of said petition.

Seven.

Denies each and every allegation set out and contained in paragraph seven of said petition, except that this answering bankrupt admits that at the time he filed his petition in bankruptcy and at the time he was adjudged a bankrupt, that there had theretofore been seeded during the summer and fall of 1913, a crop of winter wheat, and said crop so planted was at said times in the ground upon lands occupied by this bankrupt as a homestead entry under the homestead laws of the United States, but that upon the date of the filing of said petition and upon the date of the adjudication of bankruptcy, final proof had not been made upon said land so held under a homestead entry as aforesaid or any part thereof; that said crop was harvested and threshed sometime after the 1st day of July, 1914, and that said crop yielded approximately Nine Hundred and Eighty-seven bushels of wheat, of the value of approximately Eight Hundred and Thirty-eight and 95/100 Dollars.

Eighth.

Denies each and every allegation set out and contained in paragraph eight of said petition.

Ninth.

Denies each and every allegation set out and contained in paragraph nine of said petition, except that it is admitted that no part of the crop of wheat planted upon the lands occupied under a homestead entry as aforesaid was ever administered in said estate for the benefit of creditors.

Tenth.

Denies each and every allegation set out and con-

tained in the tenth paragraph of said petition, except that it is admitted that on the 20th day of April, 1914, by an order duly made and given in the above-entitled court, this bankrupt was discharged in bankruptcy; that the estate of this bankrupt at the time of said discharge had not been fully administered, and it is further admitted that said crop has not been surrendered to the Trustee in bankruptcy or the Referee in bankruptcy for the benefit of creditors.

Eleventh.

Denies each and every allegation set out and contained in paragraph eleven of said petition, except that it is admitted said crop has not been surrendered for the benefit of creditors.

Twelfth.

Denies each and every allegation set out and contained in paragraph twelve of said petition.

Further answering said petition on file herein, and as an affirmative defense thereto, this bankrupt avers:

First.

That said Olmsted-Stevenson Company, during all the times herein mentioned, has been and still is, a corporation organized, created and existing under and by virtue of the laws of the State of Montana, and engaged in the mercantile business, with its principal place of business at Dillon, Beaverhead County, Montana, and that at all of said times, B. N. Stevenson was the secretary-treasurer of said corporation and Jos. C. Smith was one of the attorneys for said corporation, representing its interest as a creditor of this bankrupt.

Second.

That on the 5th day of February, A. D. 1914, this bankrupt voluntarily filed his petition in bankruptcy in this court, together with the schedules of his debts, assets and property, and upon said date was adjudicated a bankrupt.

Third.

That thereafter, on the 4th day of March, A. D. 1914, one Charles W. Conger was appointed trustee of the estate of this bankrupt, and that thereafter the said Charles W. Conger duly qualified and entered upon the discharge of his duties as such Trustee, and upon the 31st day of March, A. D. 1914, said Trustee duly made an order setting apart to this bankrupt his exempt property under the laws of the State of Montana and the laws of the United States, including among other property, said real estate so held under said homestead entry as aforesaid, and that thereafter on the 20th day of April, A. D. 1914, an order was duly made and given, discharging this bankrupt.

Fourth.

That in schedule A, accompanying and being a part of this bankrupt's petition in bankruptcy, said schedule giving and containing a statement of all creditors whose claims are and were unsecured, there was entered and set forth the claim of the said Olmsted-Stevenson Company, the petitioning creditor herein, in the manner required by law.

Fifth.

That in schedule B (1), being a statement of all real estate belonging to said bankrupt, which said

schedule was a part of and accompanied the said petition of this bankrupt, was set forth and contained certain real estate situated in Beaverhead County, State of Montana, held and occupied by this bankrupt under a homestead entry made September 28th, 1910, under the laws of the United States, upon which said homestead entry, at the time of the filing of said petition and the adjudication of this bankrupt as a bankrupt, final proof had not been made; and that in schedule B (5), being a particular statement of the property claimed as exempted from the operation of the acts of Congress relating to bankruptcy, was entered, set forth and contained said real estate so held and occupied under said homestead entry as aforesaid.

Sixth.

That at the time of the preparation of this bankrupt's petition and schedules, and that at the time of the filing thereof, and at the time of the adjudication of bankruptcy therein, there was upon said real estate, so held and occupied under said homestead entry as aforesaid, winter wheat seeded the Fall before, which said wheat would not mature until during the season of 1914, and that at all of the said times said bankrupt honestly believed and ever since has honestly believed up until after the filing of said petition by said petitioning creditor, that said crop sown upon said lands as aforesaid was a part and parcel of said real estate and that at the time of the preparation of said petition and schedules, he stated to his attorneys that said crop so upon said lands was in his possession as aforesaid,

and was informed and advised by them that said crop was a part of said real estate and that it was not necessary or required that said crop be listed separately in said schedules; that at the time of the filing of this bankrupt's petition in bankruptcy and his adjudication as such, the petitioning creditor herein, Olmsted-Stevenson Company, knew and ever since has known, that this bankrupt was at all times until after the harvesting of said crop, in the open, notorious and well-known possession of, and at all times claimed to be, the owner of said crop.

Seventh.

That at the time of the filing of this bankrupt's petition and schedules, and at the time of his adjudication as a bankrupt therein, the said petitioner, Olmsted-Stevenson Company, and its agents and servants knew and ever since have known, that said crop was upon said lands and that this bankrupt owned and was in possession of said crop, and that the said Charles W. Conger, after his appointment and qualification as Trustee herein as aforesaid, and prior to the making of an order by the said Trustee, setting apart to this bankrupt his exemptions and prior to the date upon which this bankrupt was discharged as aforesaid, well knew that said crop was upon said lands and premises as aforesaid, and that this bankrupt claimed to be and was the owner thereof, and that this bankrupt, after the appointment and qualification of said Trustee and before the order setting apart to this bankrupt his exemptions, told said Trustee that said crop was upon said lands and that he, the said bankrupt, was the owner there-

of, and that said Trustee before making said order as aforesaid, considered said matter and consulted with the said Olmsted-Stevenson Company, its agents, attorneys and servants, and was advised by the attorney for the said Olmsted-Stevenson Company that said crop was a part and portion of said real estate, and as such, belonged to this bankrupt, and that said trustee thereupon told the attorney for this bankrupt that said crop was a part of and admitted to be a part of said real estate, and as such exempt to said bankrupt, and that he would make an order setting apart to this bankrupt said real estate as exempt.

Eighth.

That this bankrupt honestly and truly believing that said crop was a part of said real estate, and as such was not entitled to be administered by said Trustee for the benefit of said bankrupt's creditors herein, remained in possession of said crop, took care of harvesting and threshing said crop and expended large amounts in taking care of, harvesting and threshing said crop in work, labor, materials and moneys expended; that since the threshing of said crop, honestly and in good faith believing that said crop was not entitled to be administered for the benefit of his creditors herein, has sold and disposed of a large proportion of said crop and has laid out and expended the proceeds thereof, and has not now in his possession, nor could he, if required to do so, now surrender a portion of said crop, sold as aforesaid, to said Trustee to be administered.

Ninth.

That the said petitioning creditor herein, with full knowledge of all the facts in this case as aforesaid, consented, advised and knowingly permitted the said Trustee to proceed with the administration of said estate and set aside to this bankrupt his exemptions including the real estate upon which said crop was growing, and to permit this bankrupt in good faith to expend his labor, time, material and money in taking care of harvesting and marketing said crop, and that by reason thereof, said petitioning creditor now is estopped from claiming or requiring this bankrupt to surrender said crop or to surrender the proceeds of said crop in order that the same may be administered and distributed to this bankrupt's creditors herein.

Tenth.

That the reasonable value of the work, services, materials furnished, money expended by said bankrupt, and the value of the use of the lands upon which said crop was grown, since the 5th day of February, 1914, the time his petition in bankruptcy was filed, in raising, maturing, harvesting, threshing and caring for said crop, amounted in the aggregate to the sum of \$525.33 or thereabouts.

Eleventh.

That at the time of the filing of the petition of this bankrupt herein on said 5th day of February, 1914, and at the time of the adjudication of his bankruptcy, said crop was exempt from execution because being grown upon land which was exempt and claimed as exempt by said bankrupt and could

not be attached, or levied upon, or seized or appropriated for the payment of his debts or any of them, and that said bankrupt always considered and claimed the same as exempt as hereinbefore set out, said bankrupt considering the same as exempt as a part of said real estate up until after the filing of the petition of the petitioning creditor herein; that after the filing of said petition of said petitioning creditor herein, he was informed that said crop under the bankruptcy laws of the United States was not considered as a part of the real estate, but that the same was exempt as growing and unmaturing crop at the time of the filing of his petition in bankruptcy herein, and at the time he was adjudicated a bankrupt in said proceeding in bankruptcy by the Court, and that he claims the same as exempt and as a part of his exemptions and has always made such claim as to said crop in good faith and as an exemption allowed him by the laws of the State of Montana and of the United States; that said crop was growing at the time of the filing of said petition in bankruptcy and at the time he was adjudicated a bankrupt upon a homestead entry for which final proof had not been made as hereinbefore set out, and that such land upon which said crop was growing was exempt and that the growing crop thereupon was also exempt.

WHEREFORE, this petitioner prays that it be ordered and adjudged that the petitioning creditor herein is estopped and has waived all its rights to object to the failure of this bankrupt to include in said schedules or any of said schedules said crop, and

is estopped and has waived its right to have said crop administered in said bankruptcy proceeding, and is estopped to insist and has waived its right to claim that said crop was and is an asset of said estate and not a portion of said real estate, or to insist that said crop is and was not exempt.

2. That if the Court should hold under the facts and circumstances in this case, that said bankrupt should be required to amend his schedule of assets, that an order be made giving this bankrupt leave to also amend his schedule, setting for his exemptions by including therein his said crop, and that the said crop be set apart to this bankrupt as exempt.

3. Said bankrupt without waiving any of his objections to said petition of said petitioning creditor and without waiving his right to claim that said crop is and was exempt, and reserving the same and all of said objections and also reserving his right to amend said schedules by claiming said exemption as hereinbefore set out, prays that in the event that it should be determined that under the facts in this case, said crop should be administered for the benefit of creditors herein, that an order be made that this bankrupt be reimbursed for the amount expended in labor, work, materials and supplies furnished by him in raising, cultivating, harvesting, threshing, marketing and caring for said crop, and for the rental value of the ground upon which said crop was raised, matured, threshed, harvested and cared for from the 5th day of February, A. D. 1914, the date upon which his petition in bankruptcy was filed herein, amounting in the aggregate to the sum of \$525.00 or there-

abouts. Said bankrupt also prays for his costs herein expended and for such other and further relief as may be meet and proper.

R. S. MILLER,

Bankrupt.

H. W. RODGERS and H. G. RODGERS,
Attorneys for Bankrupt.

(Duly Verified)."

[Opinion of Referee in Bankruptcy.]

VII.

That a hearing was had upon said petition and answer, and that after said hearing, and on or about the 31st day of December, 1914, the said Frank W. Haskins, Referee in bankruptcy for the District of Montana, rendered and filed his opinion upon said hearing which, (omitting the heading and formal parts thereof), was as follows:

"This matter came on for hearing upon the 7th day of November, 1914, upon the petition of the Olmsted-Stevenson Company, a corporation, to require the bankrupt to amend his schedules herein and account for a certain crop of wheat, and an order to show cause thereupon issued. At the conclusion of the introduction of the testimony counsel for the respective parties, Messrs. Jos. C. Smith, and Rodgers and Rodgers were given time to present briefs upon the matters involved.

The bankrupt herein, R. S. Miller, was so adjudicated upon the 7th day of February, 1914, upon a voluntary petition filed by him February 5th, 1914.

At the time of the filing of his petition and

schedules herein among other property the bankrupt had a homestead, not then patented, upon which he was residing, described as follows: Lots one and two, Section nineteen, Township 7 South Range 7 West; the Northeast quarter and the east half of the Northwest quarter of Section twenty-four, Township 7 South Range 8 West Montana Meridian.

There was a lot of personal property mostly claimed as exempt and which in due time the trustee, C. W. Conger, set aside as exempt, with some few exceptions. To his report thus filed, exception was taken by the bankrupt and the referee finally determined same in favor of the bankrupt. However, at the time of filing his petition, the bankrupt had upon the homestead above-described, which has been set apart as exempt, about 50 to 52 acres of Turkey red fall wheat, which had been planted in September, 1913. No mention was made in the schedule of bankrupt anywhere concerning this growing crop. The testimony is that the homestead being exempt, this was considered a part of the real estate and hence no mention of it in the schedule. The bankrupt advised his attorneys of the situation at the time and was told by them that it was a part of the real estate, and did not need to be scheduled. The Trustee upon his selection, qualification and administration of the estate herein was likewise so advised by attorneys. Thereafter the petitioner Olmsted-Stevenson Company filed their petition to have

it included in the schedule. This is now the matter for determination. I am of the opinion that no fraud was intended by the bankrupt. He was honest in the preparation of his schedules.

When harvested this land returned 987 bushels of this wheat. Some of it has been disposed of and the bankrupt thought upon his examination there was approximately 600 bushels on hand yet. The bankrupt claims he is entitled to \$525.33 for the rental of the land and for his expenses in connection with the raising and harvesting of the crop. Counsel for petitioner contends that the sums asked are greatly exaggerated. It may be true, but no other evidence upon the question was offered, save that of the bankrupt, and the referee must have something to base his estimates upon. His only measure here is the testimony of the bankrupt. He says he is entitled to expenses in the sum of \$325.33. The Referee is not prepared to say that these figures are excessive and the further sum of two hundred dollars so far as I am advised is not unreasonable, for the rental of the land, or for its use, when considered in the light of the testimony given here.

Under the circumstances herein I do not find the petitioner is guilty of laches. The bankrupt should have either scheduled the crop, or have asked leave to amend, if he thought there might be a question concerning it. As he has about six hundred bushels of this wheat on hand,

or had at the time of the hearing, I can see no reason for entering into a discussion as to his ability to comply herein with any order made. He should file an amended schedule showing this crop and let him set forth the exact amount he now has on hand. Out of that he has disposed of he is entitled to reimbursement in the amount above mentioned. If he has not received enough from that disposed of to compensate him as herein indicated, upon the disposition of the balance he may be reimbursed for the difference.

I have reached this conclusion from the cases following:

In re Coffman, 93 Fed. 422.

In re Daubner, 96 Fed. 805.

In re Hoag, 97 Fed. 543.

In re Barrow, 98 Fed. 582.

I have given the matter much consideration and from the evidence submitted and the authorities I can reach no other conclusion.

An order may be granted granting the petition requiring bankrupt to amend and allowing him the compensation and expenses herein set out, out of such wheat as he may have disposed of, or if he has not disposed of enough for that purpose he may file his petition for the balance. The wheat being in his possession he must accurately describe the amount now on hand and deliver the same over to the trustee. The petitioner may be allowed his costs, and his services having been beneficial to the estate he may be also allowed a reasonable attorney's fee to be

fixed and allowed upon the presentation of his petition therefor.

Dated the 31st day of December, 1914.

FRANK W. HASKINS,
Referee in Bankruptcy."
VIII.

That thereafter and on or about the 13th day of January, 1915, the said R. S. Miller, bankrupt, filed in the District Court of the United States, for the District of Montana his certain petition for the review and revision of said order of said Frank W. Haskins, Referee in bankruptcy, duly made and entered on the 31st day of December, 1914, as above stated, which said petition, (omitting the heading and formal parts thereof), was as follows:

**[Petition of Bankrupt for Review and Revision of
Order of Referee in Bankruptcy.]**

“Your petitioner respectfully shows: That your petitioner was adjudicated a bankrupt on the 7th day of February, 1914, upon a voluntary petition filed upon the 5th day of February, 1914; that upon the 7th day of November, 1914, a hearing was had upon the petition of the Olmsted-Stevenson Co., a corporation, one of the creditors herein, said petition having been heretofore filed on the 28th day of October, 1914, to require this bankrupt to amend his schedules herein, and account for a certain crop of wheat and to surrender said crop to the Trustee, and an order to show cause thereupon issued; that on the 31st day of December, A. D. 1914, an order, a copy of which is hereto annexed, was made and entered herein; that said order was and is erroneous in that:

I.

That said order is contrary to law and is contrary to the evidence herein, in that the evidence shows without contradiction that said crop of wheat at the time the bankrupt filed his petition in bankruptcy and at the time he was adjudicated a bankrupt, was growing upon said lands held by said bankrupt under and by virtue of a homestead filing and that said bankrupt had not at said times or either of said times made final proof upon said homestead and that said crop of wheat was not at said time or either of said times, subject to execution or could said crop have been levied upon of Writ of Attachment or Execution.

2.

That said crop was on the date upon which this bankrupt filed his petition herein and on the date upon which he was adjudicated, exempt from execution under the laws of the State of Montana.

3.

That said crop was on the date upon which this bankrupt filed his petition herein and on the date he was adjudicated a bankrupt, exempt from execution under the laws of the United States.

4.

That the evidence is insufficient to justify said order requiring said bankrupt to amend his schedule and to account for and deliver said crop of wheat to the Trustee in bankruptcy and this, to wit: There is no evidence to show that said crop of wheat was a part of the bankrupt's estate, which could or should pass to the Trustee in bankruptcy.

5.

The uncontradicted evidence showed that said crop of wheat was exempt at the time said bankrupt filed his petition in bankruptcy and was adjudicated a bankrupt.

6.

That the evidence shows that the petitioning creditor *Olmsted-Stevenson Company*, was guilty of laches which would prevent its prevailing herein.

7.

That the evidence shows conclusively and without substantial contradiction that the petitioning creditor herein had full knowledge that said crop of wheat was not scheduled separately for many months prior to the time that it filed this petition herein and that it acquiesced in said crop of wheat being not scheduled separately and in the claim that the same was exempt as a part of the land and therefore is estopped to claim that the same should be accounted for or delivered to the Trustee in bankruptcy.

8.

That the uncontradicted evidence establishes that the Trustee in bankruptcy had full knowledge that such crop of wheat was not scheduled separately and and was claimed as exempt by the bankrupt prior to the 1st day of April, 1914, the date upon which said Trustee set apart to the bankrupt his exemptions and acquiesced in said claim of exemption and that the petitioning creditor is bound by such knowledge and conduct of said Trustee in bankruptcy, and is therefore estopped to ask that said crop of wheat be accounted for and delivered to said Trustee in bankruptcy.

WHEREFORE, your petitioner, feeling aggrieved because of said order, prays that the same may be reviewed as provided in the Bankruptcy Law of 1898 and General Order XVII.

Dated this 13th day of January, A. D. 1915.

R. S. MILLER,
Petitioner.

H. W. RODGERS, and
H. G. RODGERS,
Attorneys for Petitioner.

(Duly verified.)”

(Copy of opinion and order of Referee attached to said petition is in the same words and figures as said order above set forth in Paragraph V of this petition.)

IX.

That thereafter and on or about the — day of January, 1915, your petitioner filed in the District Court of the United States for the District of Montana, its objections to the granting of the petition of bankrupt, R. S. Miller, for a review of the decision of Frank W. Haskins, Referee in bankruptcy, made and entered on the 31st day of December, 1914, which objections (omitting the heading and formal parts thereof), were as follows:

[Objections to Granting of Petition of Bankrupt for Review of Decision of Referee in Bankruptcy.]

“Comes now the Olmsted-Stevenson Company, a corporation, petitioning creditor herein, and objects to the granting of the petition of the bankrupt for a review of the decision of Honorable Frank W. Haskins, Referee in bankruptcy,

made and rendered herein, on the 31st day of December, 1914, and admits that said bankrupt was adjudicated a bankrupt on February 7th, 1914; that a hearing was had upon the petition of this petitioner, upon November 7th, 1914; that said petition had theretofore been filed on October 28th, 1914, asking that said bankrupt be required to amend his schedule herein; that an order to show cause was issued in said matter, and that a decision in said matter was rendered by Honorable Frank W. Haskins, Referee in bankruptcy, on December 31st, 1914, and denies each and every other allegation, fact, matter and thing, set forth and contained in said petition for review.

OLMSTED-STEVENSON COMPANY,

Petitioner.

JOS. C. SMITH,

Attorney for Petitioner.

(Duly verified.) ”

IX $\frac{1}{2}$.

That said matter of said review came on for hearing before said District Court of the United States, in and for the District of Montana, upon the papers and proceedings hereinabove set forth, and the said District Court of the United States, in and for the District of Montana, reversed the said order so made by the said Frank W. Haskins, Referee in bankruptcy for said District Court of Montana, and rendered and filed a written opinion upon said reversal, which opinion is in the words and figures following:

[Opinion of U. S. District Court.]

“BOURQUIN, District Judge. In February, 1914, Miller was adjudicated a voluntary bankrupt. He then was in occupancy of a homestead upon public lands of the United States, and thereon had 50 acres in winter wheat. The former was scheduled, but the latter not, though he disclosed it at the first meeting of creditors. The trustee had knowledge of the wheat, but on advice assumed it followed the land, which latter was set off as exempt in April, 1914. In due time Miller reaped the crop, 987 bushels. A creditor then petitioned to compel the bankrupt to schedule the wheat, and, after hearing, the referee so ordered, subject to certain allowances to the bankrupt for rent of the land and his other expenses in making the crop. The bankrupt asks review.

The Referee's order conforms to *In re Daubner* (D. C.), 96 Fed. 805, but it is believed the law is otherwise. Analogous cases are *In re Coffman* (D. C.), 93 Fed. 422; *In re Hoag* (D. C.), 97 Fed. 543; *In re Barrow* (D. C.), 98 Fed. 582; *In re Sullivan* (D. C.), 142 Fed. 620; *Id.*, 148 Fed. 815, 78 C. C. A. 505. This growing crop of wheat, when the bankruptcy petition was filed, was not property of the character that vests in the trustee. The latter is only property not exempt, and which the bankrupt 'could by any means have transferred or which might have been levied upon and sold under judicial process.' Bankruptcy Act, Sec. 70. This im-

ports property capable of change of ownership and enjoyment, without recourse to or drafts upon property and labor of the bankrupt, which are not part of the estate in bankruptcy, and upon which creditors have no claim subsequent to adjudication.

It will be noted the land upon which the wheat was growing was held by the bankrupt subject to performance by him of conditions precedent of his contract to purchase from the United States. It was a personal contract analogous to a personal privilege, not assignable, and not subject to execution, and which he could at any time abandon, and thereby extinguish. His property in the land was exempt, not by state law, but from its nature. Even when title is secured, by federal law the land is not liable for debts incurred prior to patent. R. S., Sec. 2296 (Comp. St. 1913, sec. 4551.) When the bankruptcy petition was filed, this crop of wheat had no separate existence. It was in the nature of an incident that followed the land. Its value was potential only—that might be created by the land and future labor. Of itself, it had no transfer value. It could be transferred only in connection with a transfer of occupancy, use, and literal consumption of the land to bring to it maturity. Such a qualified transferable quality is not that of Section 70, *supra*.

Nor was this crop then subject to levy and sale, if for no other reason, because otherwise the owner thereby might be prevented from per-

forming the conditions precedent, of which was cultivation to crop, of his contract with the United States, and he might abandon, relinquish or forfeit the land, whereupon land and crop would be property of the United States, to the great injury of the owner, and without benefit to the levying creditor, and to the loss of the contract to the United States. Furthermore, levy and sale could not confer right to oust the owner from the exclusive possession and use secured to homestead entrymen of public lands. After such levy and sale the crop would necessarily demand the bankrupt's land and labor to mature and sever.

But the land was always exempt, and the fruits of its labor likewise, after bankruptcy petition filed. It will not do to concede payment out of the crop for such of the bankrupt's land and labor. The Bankruptcy Act does not authorize either to be commandeered; and if the crop failed or was destroyed at harvest, from where would come this payment? The bankrupt having right to exclusive use of his homestead land, no levy and sale could prevent him from lawfully reploting and reseeding the land after his bankruptcy petition was filed. To property of this evanescent quality no levy could attach. The case is distinguishable from those wherein it has been held that growing crops are so far personal property that though upon lands exempt by state law, they are subject to levy and sale; for in these latter the personal obligation of the owner of the land continues until

after the crop is matured and severed, and the creditor, until paid, has claims upon the fruits of his debtor's exempt land and labor. In bankruptcy it is otherwise. The debtor's personal obligation is distinguished at adjudication, and thereupon his exempt and after-acquired property are free from creditors' claims though never paid. To the argument of possible injustice, in that a homestead entryman might devote such labor and money to put much land to crop, and then invoke bankruptcy between seed-time and harvest, it may be responded. No more than if he erected buildings and fences, cleared, ditched, and broke the land, none of which would inure to the benefit of his estate in bankruptcy.

Another sufficient reason for the conclusion herein is that, by standing by and permitting the bankrupt to devote his time, money, and labor to maturing the crop as his own, the trustee is now estopped to claim it. He made his election. No fraud appearing, it is final, and concludes creditors. The bankrupt assumed all risk and hazard of failure, the Trustee none, and in justice the former is entitled to whatever success was achieved. It goes without saying that, if the crop had failed, this proceeding would not have materialized, and no one would propose compensating the bankrupt for his loss."

The Referee's order is overruled, and thereupon ordered that the decision of said Frank W. Haskins, Referee in bankruptcy, for the District of Mon-

tana, made and entered on the 31st day of December, 1914, be reversed and set aside.

X.

That it was disclosed by the pleadings and proceedings filed and had upon the petition of your petitioner, as hereinbefore set forth, that it was undisputed and conceded that said R. S. Miller, bankrupt, had, at the date of the filing of his voluntary petition in bankruptcy, and at the date of his discharge, owned, and was in possession of a certain crop of winter wheat of about 50 acres, which had theretofore been sown and planted by said R. S. Miller upon certain premises theretofore entered by him as a homestead under the acts of Congress, and upon which final proof and entry had not been made; that said crop was not encumbered and that said R. S. Miller, bankrupt, had not included said crop, or any part of it, in his schedule of property and assets filed in the bankruptcy proceedings, and had never surrendered the same, or any part thereof, to his trustee in bankruptcy.

XI.

That said order of said District Court so made was erroneous as a matter of law in the following respects:

1. In reversing the order made and entered by Honorable Frank W. Haskins, Referee in bankruptcy, in and for the District of Montana, on or about the 31st day of December, 1913, requiring the said R. S. Miller, bankrupt, to amend the schedules of his property and assets, and include therein certain growing crops.

2. In deciding and holding that the bankrupt's crops growing on a homestead (entered and occupied

by the bankrupt under the acts of Congress), at the time of filing his voluntary petition in bankruptcy, were exempt to said bankrupt, under the laws of the State of Montana, or the laws of the United States.

3. In deciding and holding that the bankrupt's crops growing on a homestead (entered and occupied by the bankrupt under the acts of Congress), at the time of filing his voluntary petition in bankruptcy, do not pass to his Trustee in bankruptcy for the benefit of his creditors.

4. In holding and deciding that the Trustee in bankruptcy of R. S. Miller, bankrupt, was guilty of laches in not taking steps requiring said bankrupt to insert in his schedules of assets and property the said growing crop.

5. In holding that your petitioner could not obtain the relief asked for in its original petition because of laches.

6. In holding and deciding that any laches existed whereby relief could not be granted, as prayed for in your petitioner's original petition.

That each and all of said points and reasons above set forth were raised and argued before the District Court of the United States, in and for the District of Montana.

WHEREFORE, your petitioner prays that the order of the District Court of the United States for the District of Montana, reversing the said order and decision of the said Frank W. Haskins, Referee in bankruptcy, for said District of Montana, made and entered on the 31st day of December, 1913, be revised and reviewed in a matter of law by this Honor-

able Court, as provided by Section 24B of the Bankruptcy Act of 1898, and the rules and practice thereunder in such cases made and provided, and that said order of said District Court so reversing the said order of said Frank W. Haskins, Referee in bankruptcy, in and for the District of Montana, be set aside and held for naught, with such directions to the District Court of the United States, for the District of Montana, as to this Court may seem proper.

JNO. B. CLAYBERG,
Attorney for Petitioner

State of California,
City and County of San Francisco,—ss.

John B. Clayberg, being first duly sworn, deposes and says; that he is the attorney for the petitioner in the foregoing petition; that he has read the same and knows the contents thereof; that the same is true of his own knowledge, information and belief.

JOHN B. CLAYBERG.

Subscribed and sworn to before me this 21st day of July, 1915.

[Seal] L. H. ANDERSON,
Notary Public in and for the City and County of San Francisco, State of California.

**[Acknowledgment of Service of Petition for
Revision.]**

Service of within petition acknowledged this 24th July, 1915.

H. W. RODGERS, and
HENRY G. RODGERS,
Attorneys for Bankrupt.

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

Case No. 2628.

OLMSTED-STEVENSON COMPANY, a Corpor-
ation,

Petitioner,

versus

R. S. MILLER, Bankrupt,

Respondent.

Motion to Dismiss [Petition for Revision].

Now comes the above-named respondent and moves this Honorable Court to dismiss the Petition of petitioner on file herein upon the grounds, and for the following reasons, to wit:

First.

That said petition does not state facts sufficient to entitle petitioner to the relief therein prayed, or to any relief.

Second.

That said petition shows upon its face that the ruling of the District Court that a crop growing upon lands held by virtue of a homestead filing, and upon which lands final proof had not been made, do not pass to a Trustee in bankruptcy for the benefit of creditors, is correct.

Third.

That said petition involves questions of fact that cannot be reviewed on petition.

Fourth.

That the question as to whether or not petitioner

could not obtain the relief asked for in its original petition because of laches is a question of fact, and not reviewable by petition.

Fifth.

That said petition does not contain nor is said petition accompanied by a certified transcript of the record and proceedings or record or proceedings in the bankruptcy court of the matter sought to be reviewed herein.

Sixth.

That there has not been filed in the office of the clerk of this court a certified transcript of the record and proceedings or the record or proceedings in the bankruptcy court of the matter sought to be reviewed herein.

Seventh.

That the petition on file herein does not show or pretend to show the facts upon which the District Court held that petitioner could not now be heard to say that said crop should be surrendered for the benefit of creditors.

Respectfully submitted,

HENRY C. RODGERS,

Attorney for Respondent.

[Endorsed]: No. 2628. In the United States Circuit Court of Appeals, for the Ninth Circuit. Olmsted-Stevenson Company, a Corporation, Petitioner, versus R. S. Miller, Bankrupt, Respondent. Motion to Dismiss. Filed Aug. 23, 1915. F. D. Monckton, Clerk.

*United States Court of Appeals, for the Ninth
Circuit.*

OLMSTED-STEVENSON COMPANY,
Plaintiff,

vs.

R. S. MILLER,
Defendant.

In the Matter of R. S. MILLER, a Bankrupt.

Amendment to the Petition.

Now comes Olmsted-Stevenson Company petitioner in the above matter and files this its amendment to its said petition and alleges.

That on or about the — day of —, 1914, in pursuance of the filing of a petition by the said bankrupt to review the decision of the Referee in bankruptcy as alleged in said petition, and in pursuance of the bankrupt act the said Referee in bankruptcy made and filed his certificate returned in the office of a clerk of the United States District Court, District of Montana a certified copy of which certificate in return is hereto attached marked exhibit "A" and hereby made a part hereof.

That and after the said district court of United States District of Montana heard said bankrupt petition for review, upon the testimony returned by said Referee and upon the briefs of the counsel for the respective parties and on the — day of —, 1915, said District Court made an order reversing the order of the said Referee, as alleged in the petitioner's original petition filed in this court. A certified copy of said order is hereto attached

rupt, R. S. Miller, feeling aggrieved thereat, filed a petition for review, which is granted.

That the question presented on this review is, Did the Referee err in ordering the bankrupt to amend his schedule to include a growing crop upon the homestead at the time of his filing his petition and schedules to be adjudged a bankrupt?

The following is herewith transmitted to the Court in connection herewith:

The petition and schedules of the bankrupt.

The petition to require bankrupt to amend filed by the creditor, Olmsted-Stevenson Company, a corporation.

The transcript of the evidence taken at the hearing of said petition.

The answer of the bankrupt to the petition to amend,

The Referee's order to amend.

The Referee's findings and conclusions.

The brief submitted by counsel for bankrupt and the brief submitted by counsel for petitioner.

The Trustee's report on exemptions.

The order thereafter made allowing bankrupt additional exemptions.

The petition for review of the Referee's order.

And such other pertinent papers to the question on review.

Dated at Butte, Montana, the 14th day of January, 1915.

FRANK W. HASKINS,
Referee in Bankruptcy.

Filed Jan. 14, 1915. Geo. W. Sproule, Clerk.
By Harry H. Walker, Deputy Clerk.

I, Geo. W. Sproule, Clerk U. S. District Court for the District of Montana, do hereby certify the above to be a true copy of the Referee's Certificate on Review, on file in my office as such clerk.

GEO. W. SPROULE,
Clerk.

By Harry H. Walker,
Deputy.

**Transcript of Testimony Taken Before Referee in
Bankruptcy.**

*In the District Court of the United States, for the
District of Montana.*

No. 762.

Before F. W. HASKINS, Referee in Bankruptcy.
In the Matter of R. S. MILLER, Bankrupt.

HEARING UPON THE PETITION AND
ORDER TO SHOW CAUSE WHY THE
SCHEDULE OF THE BANKRUPT
SHOULD NOT BE AMENDED TO IN-
CLUDE CERTAIN GROWING CROPS AT
THE TIME OF THE FILING OF THE
PETITION IN BANKRUPTCY, AND FOR
AN ORDER DIRECTING HIM TO TURN
OVER THE CROP OF WHEAT OR THE
FUNDS RECEIVED FROM THE SALE OF
SAME TO THE TRUSTEE.

Mr. JOSEPH C. SMITH,
Attorney for Petitioning Creditor Olmsted-Stevens
son Co.

Messrs. HENRY G. and H. W. RODGERS,
Attorneys for Bankrupt.
CHARLOTTE McAULEY,
Stenographer.

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[**Testimony of B. W. Stevenson, for Petitioner.**]

Mr. B. W. STEVENSON, a witness on behalf of the petitioner, being first duly sworn, testified as follows:

Direct Examination by Mr. SMITH.

Q. You may state your name.

A. B. W. Stevenson.

Q. What, if any, position do you hold with the Olmsted-Stevenson Company?

A. Secretary and treasurer.

Q. This is a corporation doing business at Dillon, Montana? A. Yes, sir.

Q. Were you, as an officer of that corporation, notified of the fact that R. S. Miller had in February last filed his petition in bankruptcy?

A. I was.

Q. You—the company—Olmsted-Stevenson Company, was notified as a creditor of R. S. Miller of a meeting of creditors? A. Yes, sir.

Q. And you knew that R. S. Miller was going through bankruptcy? I use that expression, it may not be just right. A. Yes, sir.

Q. Now, Mr. Stevenson, did you examine the schedules of property as filed by Mr. Miller?

A. Yes, sir, I did.

Q. And with respect to a certain crop of growing wheat, growing grain I would say, did you have any knowledge on that subject at the time you examined this schedule, as to whether or not the schedule was complete? A. No, sir, I did not.

Q. In other words, did you have any knowledge

(Testimony of B. W. Stevenson.)

that Mr. Miller actually had a crop of growing wheat?

A. Not prior to his discharge in bankruptcy.

Q. You state in your petition that about the 18th of September, on or about the 18th of September, you became apprised of the fact that the bankrupt had matured a crop of wheat which was growing at the time he filed his petition. What have you to say as to that—respecting the time?

A. The date would be approximate more than actual. It was some time before that that I knew of it. It may have been in August some time that I first knew of it.

Q. You would say then that possibly some date in August would be more exact than the 18th of September, but certainly not before the first of August?

A. No.

Q. You didn't know about it prior to that?

A. No, I did not.

Q. Now, Mr. Stevenson, as a credit man and secretary and treasurer for the Olmsted-Stevenson Company, I will ask you if it isn't a fact that you have general knowledge that farmers living in the vicinity of Dillon generally have growing crops of winter wheat; that is dry land farmers?

A. It is presumed they have, but it isn't always the case though that—

Q. You had no special knowledge as to Mr. Miller's crop?

A. I had no personal knowledge as to Mr. Miller's crop, no.

(Testimony of B. W. Stevenson.)

Q. And about what time did you learn of his having matured and threshed a crop of wheat?

A. I heard of the threshing of it—was really the first definite knowledge I had of it—was after the crop was threshed. That was told me by two parties who were there working on the machine, or was there at the time the crop was threshed. I don't know whether they were working or not.

Q. You didn't actually see the crop of wheat yourself? A. Never seen the crop.

Q. You never saw the growing crop?

A. No, sir.

Q. I believe that is the only point I care to examine Mr. Stevenson on.

Cross-examination by Mr. HENRY RODGERS.

Q. Mr. Stevenson, you had a talk with Mr. Miller several times prior to the time he went into bankruptcy relative to the claim your company holds against him? A. Certainly, yes, sir.

Q. Had you discussed with him what property he had?

A. Not in the way of growing crops. I have relative to the chattels he had.

Q. Did he tell you at any time that he had a winter crop of wheat? A. No, sir.

Q. Mr. Stevenson, you attended the first meeting of creditors, I believe? A. Yes, sir.

Q. You and Mr. Wedum? A. Yes, sir.

Q. And Mr. Miller was sworn and examined at that time? A. I believe so.

Q. Do you remember who asked him the questions,

(Testimony of B. W. Stevenson.)

whether you did or Mr. Wedum?

A. To what questions do you refer?

Q. Any questions. Who examined Mr. Miller?

A. I asked him some questions, yes.

Q. At that time you looked over the schedules?

A. Yes, sir.

Q. On that occasion did you or did you not ask Mr. Miller what crops he had growing upon his homestead? A. I did not.

Q. And didn't he reply that he had some 50 or 51 or 52 acres of winter wheat?

A. Not to my knowledge. He didn't make any reply of that kind. I didn't ask him the questions.

Q. Did Mr. Wedum? A. I couldn't say.

Q. You were present at the time?

A. I was present.

Q. Didn't you ask Mr. Miller at that time whether that crop was listed separately from his other property? A. I did not.

Q. And didn't he reply that it was not?

A. Not to me.

Q. Now, you at various times talked the matter of this bankruptcy over with Mr. Conger, the Trustee in bankruptcy? A. In a way, yes, sir.

Q. And at any time, did you and Mr. Conger discuss the fact there was a crop at that time?

A. No, sir.

Q. Nothing ever said about that at all?

A. Not to my knowledge.

Q. Mr. Smith is attorney for the company?

A. Yes, sir.

(Testimony of B. W. Stevenson.)

Q. And represents the company in this matter for sometime? A. He has in this petition.

Q. He did before, did he not?

A. I do not know that he has had any connection with it before.

Q. You discussed this case with him, didn't you, and consulted him as to the preparation of your claim against the bankrupt? A. Oh, yes.

Q. Then he had a part in this matter?

A. Yes, within a recent date, yes, sir.

Q. How far from Dillon is this—is Miller's land?

A. I couldn't tell you the distance. I never was by the place but once.

Q. And you—about how far?

A. I couldn't tell you.

Q. Is it about 10 miles? A. Might be.

Q. It is what is known as the dry land bench? The methods used there in farming are dry land methods? A. Largely, yes, sir.

Q. And are you acquainted with that bench?

A. To a certain extent.

Q. You know, as a general thing, that what those people raise up there is winter wheat—that it is, at least, their principal crop?

A. That is the principal crop, yes, sir.

Q. And knowing that you didn't make any inquiries at any time as to whether he had any crop or not? A. I did not.

Q. You was—you were active there, wasn't you, for your company in trying to find out what goods he had and what the prospects were of collecting your claim?

(Testimony of B. W. Stevenson.)

A. Not after he was discharged in bankruptcy—until certain things came up, I heard about in a roundabout way. Then I became active.

Q. Before that you didn't pay much attention to it?

A. Well, not from the time he filed his bankruptcy until he was put out—or discharged.

Q. You had been trying to collect your claim—had started this suit and obtained judgment before that?

A. Yes, sir.

Q. And yet you hadn't inquired anything about crops?

Redirect Examination by Mr. SMITH.

Q. Mr. Stevenson, just another question to clear this up. I will ask you just what you did question Mr. Miller about at the meeting of creditors.

A. In the list of exemptions Mr. Miller claimed there was various items covering certain quantities of grain held out for seeding purposes. I took the amounts of grain he was claiming as exempt and figured out about how many acres of grain that would seed. I asked him the question how many acres he had prepared for spring seeding. The point I wanted to make was that he was holding out more than he could possibly use for spring seeding. That is the only questions I addressed to him relative to the crop or prospective crop at his place.

Q. And your object in so questioning him was to see if he hadn't allowed too much seed grain—claimed too much?

A. If he wasn't claiming too much grain for seed-

(Testimony of B. W. Stevenson.)

ing purposes. I don't recall just now the number of acres I figured out or how many he told me he had prepared for spring seeding.

Q. Now, then, Mr. Stevenson, did you at any time discuss with the trustee, Mr. Conger, the question of whether or not the amount of seed grain the bankrupt had claimed should be allowed him?

A. I did.

Q. And as a matter of fact, the trustee by his ruling first held that the bankrupt should deliver over a part of the seed grain he had set down as exempt?

A. That is my understanding.

Witness excused.

[Testimony of R. S. Miller, for Petitioner.]

Mr. R. S. MILLER, a witness on behalf of the petitioner, being duly sworn, testified as follows:

Direct Examination by Mr. SMITH.

Q. You are R. S. Miller, the bankrupt in this case?

A. Yes, sir.

Q. You made and filed your petition in bankruptcy about the 5th day of last February? A. Yes, sir.

Q. You at that time were living upon a homestead claim a few miles out of Dillon, were you?

A. Yes, sir.

Q. And what growing crops did you have on that place at that time?

A. Approximately 50 acres of turkey red fall wheat.

Q. You had no rye, flax or other grains?

A. No, sir.

Q. Now, then, Mr. Miller, when was this wheat

(Testimony of R. S. Miller.)

planted? Approximately; I don't expect you to remember the week.

A. Just before freezing-up time—anyway, it was—would be safe to say—possibly the last of September or the first of September, middle of September, somewhere about that.

Q. Possibly in September, 1913? A. Yes, sir.

Q. This crop of grain sprouted and grew up before the 5th day of February, did it?

A. No, it didn't grow up; it just sprouted. Some was a little out of the ground, other places wasn't out of the ground. You might as well say it was all up.

Q. Of course, when you filed your petition in bankruptcy, you knew this crop of growing grain was there, didn't you? A. Yes, sir.

Q. And you didn't include it in your schedule?

A. No, sir.

Q. As a separate item. Now, then, you were discharged from bankruptcy? A. Yes, sir.

Q. In April, of this year, I believe?

A. Something like that, yes. I don't remember. You understand—

Q. Now, then, after your discharge from bankruptcy, did you execute a mortgage covering this crop of growing grain? A. No, sir.

Q. You didn't give any mortgage? A. No, sir.

Q. Did you submit your final proof on homestead after your discharge from bankruptcy?

A. Yes, sir.

Q. That proof has gone through the department and I presume you have received final receipt?

(Testimony of R. S. Miller.)

A. Yes, sir.

Q. Now, then, you harvested this crop of wheat and made— How many bushels did you harvest?

A. Well, there was 1,012 bushels total. There was 25 bushels of the 1,012 that was barley. That was spring grain, you understand. That leaves 983, doesn't it?

Q. Then you harvested 987 bushels of wheat?

A. Yes, sir; fall wheat.

Q. What was the value of that wheat? As stated here, \$838.95? A. Something like that, yes, sir.

Q. Now, this crop of wheat was growing upon what number of acres of land?

A. 50, approximately, 50. It was registered 50, but it might be an acre over or under. I never measured with a tape measure.

Q. Did you do any—perform any labor upon this crop of grain prior to cutting it? A. Yes, sir.

Q. After the 5th of February? A. Yes, sir.

Q. In the nature of what?

A. I harrowed it once.

Cross-examination by Mr. RODGERS.

Q. Mr. Miller, at the time that you went in bankruptcy—your schedule and petition was filed and you were adjudged a bankrupt—had you made final proof upon your homestead? A. No, sir.

Q. You were then holding it simply under homestead entry with the United States Government?

A. Yes, sir.

Q. And that is the land upon which this crop was growing? A. Yes, sir.

(Testimony of R. S. Miller.)

Q. Had you had, prior to the time you filed your petition in bankruptcy, any conversation with Mr. Stevenson of the Olmsted-Stevenson Co.?

A. Yes, sir.

Q. Relative to what crop, or about what crop you had? A. Yes, sir.

Q. Where was that conversation, and about when, relative to the time you went into bankruptcy?

A. About 2 days before I took bankruptcy.

Q. And who was present?

A. My wife was present.

Q. Was there anything said at that time about whether or not you had any crops? A. Yes, sir.

Q. What was said relative to the crop, if anything?

A. Why, Mr. Stevenson was going to sue me and get a judgment against me. I went there and—well, I almost begged of him not to sue me—that I didn't want to be sued—that I was willing to square it up any way I possibly could. I offered him a mortgage on the growing crop and note for the balance, together with my notes, and he said, no. He said, "Your note is no good. It isn't worth the paper it's written on, and the crop won't pay the bill."

Q. Did you tell him at that time how much you had in in crop? A. Yes, sir.

Q. Now, at the time you had your petition and schedules prepared in bankruptcy, did you say anything—did you employ anyone to prepare your petition and schedules? A. Yes, sir.

Q. Whom did you employ?

(Testimony of R. S. Miller.)

A. Mr. Gilbert and Mr. Rodgers.

Q. They are partners? A. Yes, sir.

Q. That is my partner and I? A. Yes, sir.

Q. And in the preparation of these schedules, did you say anything to them or either of them about whether or not you had crops out there?

A. Yes, sir.

Q. What did you tell them?

A. I told them I had 50, approximately 50 acres in fall wheat, and he Gilbert, set it down, and after he set it down and when I seen the schedules I noticed that the wheat wasn't on there, and I said to Mr. Gilbert, I says, "What seems to be the cause this wheat isn't down? What is the matter?" "Why," he said, "that's growing in the ground. That's real estate. You couldn't take it out if you wanted to."

Q. Did you believe his advice? A. I did.

Q. And that that was the case?

A. Yes, sir, I did.

Q. Now, did you attend the first meeting of creditors in your bankrupt estate? A. Yes, sir.

Q. And who was present at that hearing?

A. Mr. Wedum, Mr. Stevenson, myself, Clarence Langdorf, Mr. Haskins. I don't know whether I should put his name in there or not.

Q. That is all right. You were sworn and examined at that time? A. Yes, sir.

Q. Do you remember who asked you the questions?

A. Why Mr. Stevenson and Mr. Wedhum, both.

(Testimony of R. S. Miller.)

Q. Who is that, Mr. Stevenson of the Olmsted-Stevenson Co.? A. Yes, sir.

Q. Was there any questions asked you at that time, or did you make any statement relative to having a crop upon your homestead? A. Yes.

Q. Go ahead and tell what was said relative to the growing—

A. Mr. Stevenson had the schedules, looked them over, and he says, “I see you haven’t listed your fall wheat,” he says, “that you have planted,” he says. “Have you listed that in a schedule by itself?” I said, “No, sir.” Mr. Wedum asked me as to what crops was I going to put in in the spring, and he also asked me about the growing crop.

Q. Now, Mr. Miller, did you at any time have any conversation with, or did the trustee in this case, Mr. Conger, ever ask you anything about the crops?

A. Yes, sir.

Q. Tell when and where, or where and what was said, as near as you can remember.

A. He came across the street, and I met him in front of the Olmsted-Stevenson store on the opposite side of the street, and I says to him, “When are you coming out to get that stuff, Mr. Conger?” And he says, “Well, I don’t know. I haven’t got them all fixed up, yet,” he says, and “Have you heard anything about the exemptions on that grain?” And I says, “No, sir; I hadn’t heard.” He says, “I wrote up to Butte to find out from Mr. Haskins”—I won’t say whether he said Mr. Haskins or not, but he wrote to Butte to find out. If I remember right, that is

(Testimony of R. S. Miller.)

what he said. Anyhow, he said, "What are you going to do about the fall wheat you have in the ground?" I said that was real estate, as near as I know.

Q. Now, Mr. Miller, you have continuously lived upon your homestead? A. Yes, sir.

Q. That conversation took place sometime last spring, did it?

A. Yes, sir. It was before that Mr. Conger asked for to come out and get the stuff. It was before I had noticed about it at all. Yes, just about the time they was writing about the seed. Whether that ought to be exempt or called seed wheat or what.

Q. Now, who had remained in possession of and occupied your homestead since then?

A. I have.

Q. Who has been farming the homestead?

A. I have.

Q. Have you at any time or at all claimed anybody else was farming that place or taking care of the homestead? A. No, sir.

Q. Who employed or did the work done on the crop. A. I did.

Q. Who made arrangements for the threshing of the grain? A. I did.

Q. In your own name, or somebody else's?

A. In my own name.

Q. Will you state whether or not it was generally known in the neighborhood that you owned that crop? A. Yes, sir.

Mr. SMITH.—Mr. Referee, I do not know just

(Testimony of R. S. Miller.)

what the procedure is, but at this stage I wish to enter an objection as to this as irrelevant and immaterial as to what was generally known in the neighborhood about his growing a crop.

Mr. RODGERS.—It would be a circumstance in—

Mr. HASKINS.—In a question of fraud—but there is a question of fraud, Mr. Smith, and it would be a question of fraud as to whether he attempted to sell it—

Mr. SMITH.—I thought it was attempting to show the question of laches.

Mr. HASKINS.—I thought they were attempting to reach the question of whether they were guilty of fraud or not.

Mr. RODGERS.—When, if at all, did you ascertain that that crop could not be listed separately from the real estate in your schedules?

A. Why, I never knew it should have been listed separately at all—just the other day when they showed their petition. Never thought a thing about it. I always honestly and faithfully thought the crop was real estate at the time of the bankruptcy.

Redirect Examination by Mr. SMITH.

Q. Mr. Miller, you say about two days before you filed your petition in bankruptcy you had this conversation with Mr. Stevenson and your wife was present? A. Yes, sir.

Q. I believe you stated that he—I believed you used the word they, meaning the corporation, were threatening to sue you? A. Yes, sir.

Q. I will ask you if it was a fact that they had

(Testimony of R. S. Miller.)

sued you and obtained judgment as early as the month of January, and that before you had this conversation with them which you say was two days before the 5th of February? A. No, sir.

Q. Do you know when the judgment was obtained against you? A. Yes, sir.

Q. When?

A. Well, not the exact date, no, sir; I don't know, but the day I started bankruptcy proceedings was about 2 days before the trial came off. The first trial, that is, you understand, when you were suing me—when the trial was to come off, that is the time I started bankruptcy. That was when I put it.

Q. Well, you speak of a trial, Mr. Miller, did you ever have any trial of that suit?

A. Why, I didn't come to the trial. You folks got a judgment against me.

Q. Was the time for your answering expired when you filed your petition in bankruptcy?

A. Was the time for answering—I didn't quite get that.

Q. Had the time for answering expired before you filed your petition?

A. Well, I don't know how long that would have been when it would expire—would be just the same day of the suit, wouldn't it? I don't know when it would expire.

Q. You do not know then, when judgment was obtained against you?

A. Not the exact month or day, but I know just about 2 days before that that I started suit, or else

(Testimony of R. S. Miller.)

that it was—if I remember right it was just the day before I got the—or they sued me—the day of the trial that I started bankruptcy proceedings.

Recross-examination by Mr. RODGERS.

Q. What do you mean by starting bankruptcy proceedings? Do you mean when your wife was there, or when you first consulted your attorney about it?

A. When I first consulted my attorney.

Witness excused.

[**Testimony of B. W. Stevenson, for Petitioner—
Recalled.**]

Witness STEVENSON recalled.

Direct Examination by Mr. SMITH.

Q. Mr. Stevenson, do you recall a conversation between yourself and Mr. Miller and his wife respecting their indebtedness to the Olmsted-Stevenson Co.? A. Yes, sir.

Q. Can you tell us when that conversation took place? Was—about when, with respect to the time when he prepared and filed his petition?

A. I think it was just a short time prior to the time I heard he had made petition for bankruptcy. I really do not know the month. It must have been in February some time. I think it was just a short time prior to his making petition in bankruptcy.

Q. Now, what was that conversation about—what was the substance of it?

A. Well, it's pretty hard to recall just exactly what a conversation is about that—because we have quite a few of those conversations. But, as near as my remembrance is, that he offered—that is he

(Testimony of B. W. Stevenson.)

wanted to know how we could settle the affair and I believe I suggested that if he would give me a mortgage on his chattel property, which was some horses, that we could fix it up that way, and he stated there was 2 of the horses, I think it was 2, that belonged to his wife, that were already under mortgage to his brother in law or some in law or some relative of his, and that the other horses he wouldn't mortgage them under any condition. Then he suggested that if he could get his father in law to go on his note, if that would be satisfactory. I told him it would be entirely satisfactory to have his father in law, Mr. O. W. Smith, would sign his note with him. Evidently his father in law wouldn't do it, because they never did it. The next thing I heard was they were in bankruptcy.

Q. Now, Mr. Stevenson, do you know the condition or the period that had been reached by the suit of Olmsted-Stevenson Co. against Miller at the time you had this conversation with him? Had he then been sued?

A. I believe we had obtained judgment by default prior to this conversation. Now, that matter isn't clear in my mind, because I hadn't given it any thought, but it runs in my mind that a judgment was given in January. Of course, the court record will show that. I wouldn't make a statement of that. Mr. Rodgers was present at the time, but I am inclined to think it was in January, I wouldn't be positive about it.

Witness excused.

[Testimony of Clarence Langdorf, for Bankrupt.]

Mr. CLARENCE LANGDORF, a witness on behalf of the bankrupt, being duly sworn, testified as follows:

Direct Examination by Mr. RODGERS.

Q. State your name. A. Clarence Langdorf.

Q. Where do you reside?

A. At the present time about 3 miles east of Dillon.

Q. I will ask you whether or not you were present at the first meeting of creditors in the R. S. Miller bankruptcy case? A. Yes, sir.

Q. Who was present?

A. Mr. Stevenson, Mr. Wedum, Mr. Haskins, Mr. Rodgers, Mr. Miller and myself.

Q. Do you remember whether or not Mr. Miller was sworn and examined at that time?

A. Yes, sir.

Q. Do you remember whether or not in his examination anything was said about him having a crop already planted upon his homestead?

A. Yes, sir.

Q. State as near as you can remember what was said.

A. I am not sure who asked him the questions but some one asked him the question if he had any fall crop in and how much and if I am not mistaken he said 51 or 52 acres. They asked him if he had any spring grain in and what he considered the total of spring grain in the ground would be. He turned and asked me—I had cut some grain for him the

(Testimony of Clarence Langdorf.)

year before—and he asked me how many acres there was in that patch and I told him 22 and then he said he was going to put that 22 and some more—I have forgotten how much he said he put in.

Cross-examination by Mr. SMITH.

Q. Well, do you know who Mr. Wedum was representing at that time?

A. I was under the impression Mr. Wedum was representing himself.

Q. Nothing to show he was representing the Olmsted-Stevenson Co.?

A. Well, no.

Q. Now, then, these things you say were asked of Mr. Miller. Do you know whom they were asked by?

A. That I cannot say. I don't remember.

Q. There was considerable amount of that talk at that time had with reference to the crops he was going to plant at some time after that date?

A. Oh, yes.

Q. And considerable discussion as to how much he would plant and how much seed grain he would require?

A. Yes, sir.

Witness excused.

[**Testimony of C. W. Conger, for Bankrupt.**]

C. W. CONGER, a witness on behalf of the bankrupt, being duly sworn, testified as follows:

Direct Examination by Mr. RODGERS.

Q. Your name is C. W. Conger? A. Yes, sir.

Q. You reside at Dillon, Montana?

A. Yes, sir.

Q. You were the trustee in this bankruptcy pro-

(Testimony of C. W. Conger.)

ceeding? A. Yes, sir.

Q. Do you remember about when you were appointed trustee?

A. No, I don't, but the papers there will show. I think you have my files. The petition was filed about February 5th, 1914, and I think I was appointed within the next 10 days, but I don't see the order of appointment. Here is a carbon copy of the order and it was dated the 4th day of March, 1914.

Q. Did you, after you were appointed did it come to your knowledge that Mr. Miller had a winter crop growing upon his homestead? A. Yes, sir.

Q. How soon after your appointment would you say it was that you first ascertained that fact?

A. It was prior to my making report on exemptions.

Q. Do you know what date you made your report on exemptions?

A. On the first day of April, 1914.

Q. Do you remember how that first came to your knowledge?

A. No, sir, I couldn't say positively whether I heard it from you or Mr. Smith or Mr. Stevenson.

Q. Did you have any conversation with or consult with Mr. Stevenson relative to the growing crop upon the premises?

A. I wouldn't say positive about that. I consulted with Mr. Smith in regard to it.

Q. And whom did Mr. Smith represent?

A. Well, I presumed he was representing the

(Testimony of C. W. Conger.)

Olmsted-Stevenson Co.

Q. Do you know whether or not at any time you had any conversation or spoke to Mr. Stevenson about the crop?

A. I had a conversation with Mr. Stevenson in regard to the amount of grain that was to be exempt as grain to be planted. My impression is that we talked of the grain that had already been planted, but I wouldn't say positively as to that.

Q. But you know you talked it over with Mr. Smith? A. I talked it over with Mr. Smith.

Q. Now, did you consider the question as to whether or not that crop should be turned over to the trustees—to the administrators?

A. I did consider it and I asked Mr. Smith at the time about it and he said it was part of the real estate, and I think you advised me to the same effect.

Q. Yes. That transpired before you made your report setting out exemptions? A. Yes, sir.

Q. Did you —

Mr. SMITH.—If the Court please I object to this line of questioning as being irrelevant and immaterial for the reason that at the present time that part—what he may have been advised about this is entirely beside the question. It is what the bankrupt did we are investigating. It doesn't make any difference if the trustee knew or didn't know that this was exempt or whether the persons that may have been questioned about the matter knew or didn't know what they were talking about.

Mr. RODGERS.—I call your attention to the case

(Testimony of C. W. Conger.)

In re Hanson reported in 107 Fed. on page 252 (reading from the decision). That is a positive statement. It is also held in another case that—

Mr. SMITH.—You haven't shown there was any attorneys representing the creditors there.

Mr. HASKINS.—The objection is overruled. I think knowledge of the trustee would be the knowledge of the creditors, especially under the circumstances in this case.

Mr. SMITH.—Do we understand Mr. Referee that the knowledge as you say of the Trustee of the existence of this crop becomes the knowledge of the creditors when the trustee doesn't take it up with the creditor?

Mr. HASKINS.—The Trustee represents the creditors, Mr. Smith, is supposed to.

Mr. SMITH.—That is very true.

Mr. HASKINS.—Supposed to represent the creditors only in this matter.

Mr. SMITH.—I don't believe the record so far shows that Conger conferred with the creditors about this. He hasn't said he conferred with any one who stated they represented the creditors in this matter.

Mr. HASKINS —But, Mr. Stevenson said you were his attorney at all times and I believe Conger said he consulted you.

Mr. SMITH.—I believe the entire record will show that Mr. Stevenson said that ordinarily I represent his company in matters of this kind and that I had prepared their claim.

(Testimony of C. W. Conger.)

Mr. HASKINS.—As I understand, Mr. Stevenson answered in response to a question asked him that you had been his attorney.

Mr. SMITH.—No, he said that I had been his attorney as to this procedure. I have been in this matter of the Olmsted-Stevenson petition filed here a few days ago.

Mr. HASKINS.—Anyway, I think, Mr. Conger would represent the creditors, his knowledge would represent the creditors as he represents all the creditors.

Mr. SMITH.—Then that would have the effect that we would suffer by his laches, of which we knew nothing.

Mr. HASKINS.—You had the opportunity of questioning him at all times.

Mr. SMITH.—A creditor couldn't fathom his mind as to what he might have known as to existing conditions. We cannot see how to meet a proposition of that kind because it is impossible that these creditors should have been held accountable for what we may term laches on the part of the Trustee, if such it be. He might have discovered a gold mine or some other kind of property. Could we fathom that?

Mr. RODGERS.—He is the agent of the creditors.

Mr. SMITH.—Any way you look at it—if it were the duty of the trustee to report this to somebody I do not see how his failure to do so is any laches on the part of a creditor.

Mr. HASKINS.—It is his duty to make a report

(Testimony of C. W. Conger.)

every two months, Mr. Smith, the creditors have the opportunity of examining those reports, examining them for themselves.

Mr. SMITH.—They didn't know of this crop.

Mr. HASKINS.—I overrule the objection.

To which ruling of the Referee the petitioner then and there duly asked for and was granted an exception.

Mr. RODGERS.—Did you tell the attorney for the bankrupt what conclusion you had come to relative to the crop that was in the ground?

A. I think I talked to them about it.

Q. Do you remember what you told him?

A. Well, I think I asked you in the first place whether it was part of the real estate or not, and I had talked to Mr. Smith at the same time and I think I told him you said it was part of the real estate.

Q. And did you at that time state whether or not you told the attorney for the bankrupt that you were going to decide that that was correct, or anything to that effect?

A. I couldn't say as to that, but I supposed it was correct.

Q. The land upon which this crop was growing was set up as exempt, was it not? A. It was.

Cross-examination by Mr. SMITH.

Q. Now, Mr. Conger, you didn't have any knowledge that I was ever talking to you as the attorney for the Olmsted-Stevenson Co. in that matter, did you?

A. Why, I don't know that I had ever been told

(Testimony of C. W. Conger.)

so. I know that at the time there was talk of presenting claims against the bankrupt Mr. Stevenson talked about going to you and getting you to prepare the claims and even asked me about the forms.

Q. Yes. You knew I had prepared these claims and helped him to make it up and file it?

A. Yes, sir.

Q. Now, then, Mr. Conger, was there ever any question in your mind as to whether or not that schedule should be amended, or whether it was up to you to report or not report the fact that a growing crop of grain was in existence?

A. I think I was in doubt about it. That is the reason I asked you.

Q. Well, did you consider that you were asking that to find out whether or not you would report that he had a growing crop of grain?

A. I asked the question of you because of the fact that I thought you were representing the Olmsted-Stevenson people.

Q. You understood that I was attorney for them in a number of matters, in different matters, and that I had talked with you about their claim and was in, and active in this matter? A. Yes.

Q. Did you inquire of anybody about this growing crop of grain?

A. I didn't need to. It was reported to me that the crop was growing there.

Q. Could you say who reported it to you?

A. Couldn't say positive. I think I heard so from Mr. Rodgers, and I am of the impression that

(Testimony of C. W. Conger.)

Mr. Stevenson and I talked of it, but I wouldn't say positively as to them. I know we talked of the other grain.

Q. About the amount he should retain for seed?

A. Yes, sir.

Q. And whether or not he should retain seed to plant in the spring or to plant in July or August?

A. Yes, sir, I took the matter up with the Referee too.

Q. That was the law point you really threshed out?

A. That was the one I really tested, yes, sir.

Q. Well, you discussed with Mr. Rodgers, the man you knew was attorney for the bankrupt, the question of the existence of this crop of grain?

A. Yes, sir.

Q. And you received from him advice to the effect that it was not entitled to be listed?

A. That it was part of the real estate.

Q. And in other words would be exempt along with the real estate?

A. Yes, sir, received the same advice from you I think.

Q. And received the same advice from me?

A. Yes, sir.

Q. But you didn't know whether I was talking to you as attorney for the Olmsted-Stevenson Co. or merely because I happened to be an attorney?

A. I couldn't say positively as to that, no, sir.

Redirect Examination by Mr. RODGERS.

Q. Mr. Conger, you didn't have any idea but what

(Testimony of C. W. Conger.)

it was your duty, if there was assets belonging to the bankrupt, to collect it in? A. No, sir.

Q. There was never any question in your mind about that?

A. Never. I tried to collect everything that belonged to the estate.

Recross-examination by Mr. SMITH.

Q. Mr. Conger, did you at any time report to the Olmsted-Stevenson Co. or any one you knew to be representing them that there was a crop of growing grain on the land of the bankrupt?

A. No, sir, I don't think I ever did.

Q. You didn't do that, and you didn't request them to enlighten you as to whether or not you should include it and require it to be included?

A. No, I don't think I ever took the matter up with either Mr. Stevenson or any of the firm in regard to the growing crop.

Witness excused.

[**Testimony of H. G. Rodgers, for Bankrupt.**]

H. G. Rodgers, a witness on behalf of the bankrupt, after being duly sworn, testified as follows:

Direct Examination by Mr. RODGERS.

Q. Your name is Henry G. Rodgers?

A. Yes, sir.

Q. Of Dillon, Montana? A. I am.

Q. You remember the meeting of creditors for Mr. Miller heard here in this office? A. I do.

Q. Well, just give us what happened there according to your recollection.

(Testimony of H. G. Rodgers)

A. As I remember it, Mr. Stevenson was looking over the schedules and questioning Mr. Miller relative to what property he had. Among other questions he asked Mr. Miller what—if he had any fall wheat. Mr. Miller replied that he had, and I think he told him the number of acres. And as I remember it, either Mr.—I think it was Mr. Stevenson asked him if he had listed that separately in the schedule. Mr. Miller said no, he had not.

Cross-examination by Mr. SMITH.

Q. Now, Mr. Rodgers, you say he asked about fall wheat? A. That is as I remember it.

Q. You didn't explain whether he meant a growing crop or 1913 grain?

A. It was relative to fall wheat in the ground.

Q. Are you positive as to that?

A. That is my best recollection. I have always remembered it that way.

Q. And in the questions regarding acres could it not have been discussing the number of acres he was to plant during the summer of 1914?

A. As I remember it I remember both subjects being discussed. How much he had in and what was to be planted.

Q. From the standpoint of acres?

A. From the standpoint of acres.

Q. Now, Mr. Rodgers, there has been some testimony to the effect that the trustee was advised by both you and me.

Mr. RODGERS.—I object to that as not proper cross-examination. That matter wasn't gone into

under direct examination. I also object to it because you cannot ask an attorney what his client told him or what he told his client.

Mr. SMITH.—I am not asking him what his client told him or what he told his client.

Mr. RODGERS.—Not proper cross-examination. I asked merely about his hearing here.

Mr. SMITH.—I am merely trying to give Mr. Rodgers a chance to give—

Mr. RODGERS.—That is not proper testimony.

Mr. HASKINS.—I suppose you can recall Mr. Rodgers, Mr. Smith.

Witness excused.

[**Testimony of R. S. Miller Recalled.**]

Mr. R. S. MILLER, recalled, testified as follows:

Direct Examination by Mr. RODGERS.

Q. I will ask you, Mr. Miller, whether or not you have always claimed this crop as exempt?

A. Yes, sir.

Q. And do you now claim it as exempt?

A. Well, I couldn't now—at the present time as near as I can see it, it is for Mr. Haskins to judge as to whether it was exempt or not.

Q. Do you claim it as exempt?

Mr. SMITH.—I object to that as being a useless question. What he claims doesn't have anything to do with it.

Mr. RODGERS.—May be it is.

Q. Now, what work, if any, have you done on that crop since the date upon which you were adjudged a bankrupt, February 5, 1913?

A. I done all the work. I harrowed it, harvested

(Testimony of R. S. Miller.)

it, threshed it and hauled it from the field to the granary.

Q. Can you give us any idea as to what you have expended and what the reasonable value of your services has been in taking care of that crop?

A. Approximately \$326.

Q. Have you kept an account or made a record or figured out how—what composed that amount?

A. Yes, sir.

Q. Could you tell us what it consists of?

A. Harrowing, use of binder, horses, 3 different men to shock with, binder twine, cook, teams, men to help meals hay, oats threshing, oil for engine, sacks, hauling in wheat from field to granary so it wouldn't spoil.

Q. Amounting in the total to how much?

A. Practically \$45 worth of sacks I never put down there at all. \$325.33; that is not figuring the \$45.

Q. Now, that \$45 isn't calculated in that and it represents what you paid for the sacks?

A. Yes, sir.

Q. Now, is there included in that amount an estimate of the rental value of that ground from the time you went into bankruptcy until the crop was taken care of? A. No, sir.

Q. What would be your estimate as to the rental value of the ground for that period of time?

A. What would be my estimate?

Q. Yes, sir.

A. Everybody who rents land or has rented land

(Testimony of R. S. Miller.)

the renter; that is the man who rents the land puts in the crop and takes it out, and the man who owns the land has been getting one-third of the crop. That is what it has been through there.

Q. That is what you use to figure from?

A. Yes, sir.

Q. How much would you say then, figuring from that, would be the reasonable rental value of this land for the period from February 5th until the crop was taken care of?

A. Well, it would be one-third of the amount of wheat I had there, 987 bushels. It was one-third of that it would be.

Q. About how much would that be worth in dollars?

A. At the present time the way wheat is going now it would be worth in the neighborhood of \$300 I guess, \$250; something of that sort. I never figured it up.

Q. Are you living now on your homestead?

A. Yes, sir.

Q. Was you living upon your homestead at the time you filed this petition? A. Yes, sir.

Q. And have you lived upon it ever since?

A. Yes, sir.

Q. Have you a family? A. Yes, sir.

Q. Wife?

Mr. SMITH.—We admit he is man of family engaged chiefly in tilling the soil.

(Testimony of R. S. Miller.)

Cross-examination by Mr. SMITH.

Q. Now, Mr. Miller, you say you harrowed this wheat? A. Yes, sir.

Q. What did it cost you to harrow it?

Redirect Examination by Mr. RODGERS.

Q. What have you done with the wheat, if anything?

A. Why, some of it I sold, paid out bills, in bills, some I got some money for. Used the money to pay for groceries.

Q. About how much would you say you had sold?

A. I think—it is mighty hard to make an estimate on it. I think probably there is 350 bushels gone now.

Q. And have you kept the rest of it there on the ranch? Have you fed any of it?

A. Yes, sir. I don't know how much I have fed.

Q. About how much would you estimate there was on the ranch?

A. I think close to 600 bushels.

Q. Have you been paid for all the wheat you sold?

A. Yes, sir.

Q. What have you done with the money?

A. Paid bills and ate it up.

Q. Ate it up? A. Yes, sir.

Q. Bought stuff to eat? A. Paid some bills.

Q. Have you expended all the money you received for that wheat in payment of bills and for goods that have been used? A. Yes, sir, and more.

Q. The wheat you have sold—you haven't got it

(Testimony of R. S. Miller.)

now? A. No, sir.

Q. And you haven't got anything in place of the wheat, have you?

A. Well, that would be pretty hard to say now. You see I got binding twine and enough—some sacks and one thing and another

Q. That was used in putting up the crop?

A. Yes, sir.

Recross-examination by Mr. SMITH.

Q. How long did it take you to harrow this crop of wheat? A. Why—

Q. What kind of a tool did you harrow that grain with? A. With a harrow.

Q. What kind of a harrow?

A. Spike tooth harrow.

Q. How many horses did you have on it?

A. Four.

Q. How many men did it take to run that?

A. One.

Q. How many acres would you harrow in a day?

A. I don't know how many acres I would harrow in a day.

Q. How wide was the harrow?

A. Blamed if I know.

Q. Well, estimate it, Mr. Miller. You know something about—how near?

A. Oh, I would safely say about 12 feet, I think.

Q. About 12 feet wide, and you worked it with four horses? A. About that.

Q. Can you tell us about how many acres you would drag over in a day?

(Testimony of R. S. Miller.)

A. No, that would be pretty hard to say because some days I would not work a long day, you understand, and that is pretty hard to say how long a day I would put in. It would depend upon the day we put in.

Q. With that kind of an outfit couldn't you easily harrow two acres in an hour? A. Well, no, sir.

Q. You think you couldn't? A. No.

Q. Were you lap-harrowing it? A. No.

Q. Just once over? A. Once over.

Q. And do you think in a day of 8 hours you could have handled 16 acres?

A. Well, it seems to me I ought to be able to handle 16 acres all right in a day, you understand?

Q. Well, then it would take you but very little over 3 days to handle all of it, wouldn't it?

A. No, it wouldn't take probably over 3 days.

Q. Now, what is the use of 4 horses worth for a day?

A. A man and 4 horses is worth \$10 per day.

Q. \$10 a day?

A. Yes, sir. By the time you feed them.

Q. Then at that figure the cost of harrowing it would be practically \$30?

A. I put it down at \$25.

Q. You put it down at \$25, then, the original cost?

A. Yes.

Q. Did you ever get \$10 per day for a man and 4 horses? A. Oh, yes.

Q. Where? A. I got it in Washington.

Q. What was the nature of the work?

(Testimony of R. S. Miller.)

A. Most every kind of work. Everything.

Q. Is that kind of a basis the basis on which you figured out this \$325 expense? A. No.

Q. Is anything else?

A. You understand, Mr. Smith, I didn't figure that at \$10 per day. You stated approximately—

Q. At 50¢ per acre?

A. And that is what everybody charges to harrow.

Q. Now, what did it cost you to cut this grain? What do they charge per acre for cutting grain?

A. It all depends upon who it is. The use of the binder—I paid 40¢ per acre, just for the use of the binder. I figured the use of my horses and myself was worth 50¢ per acre, because I have to feed them and it cost me approximately \$100 last year to have it cut. It cost me practically last year to have my grain cut, \$1.00 per acre.

Q. Then it cost you to cut it \$1.00 per acre, which would be \$50. Is that right?

A. Why, no. I don't want to job you there. I put down here use of binder 40¢ per acre, which I paid out just for the use of the binder alone, came to \$20. Use of horses and myself came to \$25 at 50¢ per acre, that is a cost of 90¢ per acre.

Q. That is \$45 then. Is that right?

A. Yes, yes, sir, you're right.

Q. Now, then, *you to* shock the grain?

A. Yes.

Q. Do you know what that cost you?

A. Cost me about \$25.

Q. What did it cost to get it threshed? What did

(Testimony of R. S. Miller.)

you pay per bushel for threshing?

A. I paid 4¢ per bushel to have it threshed.

Q. And you had how many bushels?

A. 987, yes, sir.

Q. It cost you about \$40 for threshing?

A. Right close to it, yes. The whole bill was \$40.48.

Q. \$40.48?

A. Yes, sir. Then of course there was 25 bushels of barley that was figured. It went the same as the wheat did.

Q. Now, then, did you have any expenses incident to threshing. Outside of paying for the threshing? In other words, was it threshed by community help or independently?

A. Why, independently and community help.

Q. What help did you require during threshing?

A. You understand we have more expenses, binder twine 125 lbs. at 12¢ per lb. If I remember right that is what I paid for it. Mr. Stevenson knows what—

Q. What did your twine come to?

A. I got it \$12.50.

Q. And your sacks was how much?

A. \$45. I paid 10¢ a piece for the sacks.

Q. Pay anything for string, sewing twine?

A. Yes. Oh, it couldn't have been over a couple of dollars any way.

Q. All right we will put it down a couple of dollars. Now, what help did you require, and what was it worth, in assisting in the threshing?

(Testimony of R. S. Miller.)

A. Well, really, I put in everything here. Now, the outside labor time I put that down here come to \$50.90.

Q. That was labor on threshing the grain or threshing and hauling it to the granary?

A. Outside labor, that is what was hired outside, not figuring myself whatever, just hired help to help with the threshing, men and teams, and a man to pitch it together with the sack sewer, one sack sewer.

Q. Hired help, \$50, you say?

A. And 90¢, not figuring myself.

Q. What is yours?

A. The way I rustled around, see, I figured \$5 per day.

Q. How many days did it take you to thresh?

A. I was threshing 2 days and a half.

Q. \$12.50? A. Yes, sir.

Q. Does that bring all the expense down to hauling it to the granary? A. No, sir.

Q. What other expense? A. About 14 men.

Q. I have put down here hired men 14.

A. You understand that was help to bring the grain into the machine and thresh it—it was not figuring meals or anything of that sort. There were 14 men and I charged 50¢ per meal.

Q. 14 men there for 8 meals, \$56? A. Yes, sir.

Q. All right, what else?

A. I fed up a ton of hay worth \$15, laid on the ranch.

Q. You would have been required to feed your

(Testimony of R. S. Miller.)

horses if you hadn't been threshing. Wouldn't they have eaten anything if threshing hadn't been going on? A. Yes, sir.

Q. You charge that to threshing?

A. I hired these teams to come out and do the threshing. They wouldn't have threshed if I didn't feed them.

Q. Outside teams?

A. My own teams was in with them.

Q. A ton of hay is worth how much?

A. \$15.

Q. Do you know of any \$15 hay in Beaverhead County, Mr. Miller?

A. No, I don't, Mr. Smith. I put that down at \$15, because as a rule we have to go out and get hay, haul it ourselves, and I figure up to \$15 for that load of hay.

Q. I am not objecting, I am asking you what a ton of hay costs delivered at your ranch. You are under oath. You may say what you think it is. I am not going to quarrel with you about it. You want it calculated at \$15, do you? A. Yes, sir.

Q. Is there anything—

A. They fed up a thousand lbs. of oats while they were there.

Q. A thousand lbs. of oats? A. Yes, sir.

Q. How many horses did you have there at that threshing? A. 19 head.

Q. 19 head of horses? A. Yes, sir.

Q. Two days and a half? A. Yes, sir.

Q. That would be equal to how many horses for

(Testimony of R. S. Miller.)

one day? A. How's that?

Q. We will say 50 horses for one day. Is that right?

A. Well, I don't want to give you the worst of it. That would be giving me the best of it. It wouldn't hardly be that much.

Q. Figuring it at 50 horses for one day then, each horse had how many lbs. of oats?

1. 10 lb. bucketful. How much will that weigh?

A. I don't know.

A. Now, I will tell you. 30 lbs. a day to each horse. 50 times 30 would be 1500 lbs., is it not?

Q. Did you ever feed a horse 30 lbs. of wheat in one day?

A. You stated you would give 10 lbs, to the bucketful.

Q. I am saying 10 lbs of oats to a—I am not stating what your bucket weighed. You say you fed 1000 lbs of oats. What were they worth?

A. Well, they cost me \$12.50 besides the hauling of them.

Q. Now, then, is there anything further?

A. That makes \$12 dollars, \$17.50.

Q. How's that? A. \$17.50. There is oil.

Q. All right, how much oil? A. \$11.70.

Q. What were you oiling? A. Gas engine.

Q. Did you own the engine?

A. No, W. L. Leck.

Q. Is there anything further?

A. Then I had to get that too—let that go in with the other. Then I put hauling wheat inside shed \$15.

(Testimony of R. S. Miller.)

Q. Didn't you haul this wheat during the same 2 days and a half?

A. No, stacked it up outside and hauled it in after.

Q. Is that the end of the expense items?

A. No, sir.

Q. What else have you got?

A. I believe it is. I believe that is—yes, I believe that is the end of it.

Q. You figure \$352.38? According to your figures you say it cost you that to harrow, harvest, thresh and house your grain?

A. I have it here, \$325.33. Yes, that is about right. I got it a little less the way I figured it, but—

Q. You still have 600 bushels of grain on hand at the ranch? A. Approximately 600.

Redirect Examination by Mr. RODGERS.

Q. Mr. Miller how did you arrive at the amount of oath the horses ate?

A. Well, really—I have an oat box out there just holds 1000 lbs. filled to the top. When I turned the fellows loose it was full and when I come to get my oats I looked in the box and found it empty. That is how it was.

Witness excused.

[**Testimony of H. G. Rodgers—Recalled.**]

Direct Examination by Mr. SMITH.

Q. Mr. Rodgers, it appears that in the testimony here that we both gave some advice in this matter voluntarily or as counsel, was it not, to the effect that this growing crop of grain was real estate and that

(Testimony of R. S. Miller.)

that advice was perhaps acted upon by the trustee and the bankrupt. Now, I will ask you if it isn't a fact that many of the law books treat growing crops as realty until severed from the ground?

A. Why, that is a hard question to answer.

Mr. RODGERS.—I don't think I would try to answer what the law is under—

Mr. SMITH.—I recognize that it was properly outside of this case, Mr. Referee, going into the matter, but it might appear that Mr. Rodgers and I didn't know much about what we was talking about. My idea is still that we were correct and it has nothing to do with this case.

Witness excused.

**[Certificate of Clerk U. S. District Court to
Transcript of Testimony.]**

I, Geo. W. Sproule, Clerk U. S. District Court for the District of Montana, do hereby certify the foregoing to be a true copy of the transcript of testimony taken before the Referee, on file in my office as such clerk.

[Seal]

GEO. W. SPROULE,
Clerk.
By Harry H. Walker,
Deputy.

[Exhibit "B"—Order Overruling Referee's Order.]

*In the District Court of the United States, for the
District of Montana.*

No. 762.

In the Matter of R. S. MILLER, Bankrupt.

This cause came on at this time for decision of the Court. And thereupon after due consideration, it is ordered that the Referee's order be and the same hereby is overruled.

GEO. W. SPROULE,
Clerk.

By Harry H. Walker,
Deputy Clerk.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify that the above is a full, true and correct copy of the minute entry made in the above-entitled cause on the 27th day of March, 1915.

[Seal]

GEO. W. SPROULE,
Clerk.

By Harry H. Walker,
Deputy Clerk.

[Endorsed]: No. 2628. United States Circuit Court of Appeals for the Ninth Circuit. In re R. S. Miller, a Bankrupt, Olmsted-Stevenson Co., Plaintiff, vs. C. S. Miller, Defendant. Amendment to Petition for Revision. Filed Oct. 9, 1915. F. D. Monckton, Clerk. By _____, Deputy Clerk.

[Endorsed]: No. 2628. United States Circuit Court of Appeals for the Ninth Circuit. Olmsted-Stevenson Company, a Corporation, Petitioner, vs. R. S. Miller, Bankrupt, Respondent, In the Matter of R. S. Miller, Bankrupt. Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, of a Certain Order of the United States District Court for the District of Montana.

Filed July 27, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

